Seruan Gemilang Makmur Sdn Bhd v Pegawai Kewangan Negeri Pahang

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-01–395–11 OF 2013
ABDUL AZIZ ABDUL RAHIM, ZAWAWI SALLEH AND AHMADI ASNAWI JJCA
16 FEBRUARY 2016

Civil Procedure — Judicial review — Application for — Extension of time — Leave for judicial review and leave for order of mandamus — Leave application under O 53 r 3(6) of the Rules of the High Court 1980 — Whether application promptly made — Whether made within 40 days from date when grounds for application first arose — Whether made from date decision communicated to applicant — Discretion of court — Whether applicant had good reason to extend 40 days period — Whether there was explanation of delay in making application

At the High Court, the appellant had applied for, inter alia, an extension of time to file for leave for judicial review; and for leave to apply for an order of mandamus against the respondent directing the respondent to make payment of the judgment sum in favour of the appellant. The appellant applied for leave to apply for judicial review ('the first JR application') which was filed out of time. The first JR application was later withdrawn. The appellant filed another application for judicial review for an order of mandamus, not against the defendants in the original suit but against the Menteri Besar of Pahang ('the second JR application') and the High Court allowed the application. However on appeal to the Court of Appeal by the Menteri Besar, the appeal was allowed on the ground that the Menteri Besar was the wrong party ('the Menteri Besar's appeal'). The proper party should be the respondent. In the Menteri Besar's appeal, it was held that the appellant's application for judicial review was filed out of time; and there was no application for leave for extension of time. The appellant's leave application to appeal to the Federal Court against the decision in the Menteri Besar's appeal was dismissed. The appellant then applied for an extension of time to make application for judicial review and for leave to apply for judicial review. In this judicial review application ('the third JR') the appellant named the state financial officer as the respondent. In the application the appellant also included an application for leave for extension of time to apply for judicial review. The High Court allowed the extension of time and granted leave to apply for judicial review. The respondent appealed to this court and the appeal was allowed with the court held that the leave application (with a prayer for extension of time) ought to have been served on the respondents. The case was then remitted to the High Court which then dismissed the

application for extension of time and refused the appellant's leave to apply for judicial review. Hence, the present appeal. The appellant submitted that the judge erred in law and fact in applying the ordinary general principles governing discretion to grant an extension of time to apply for judicial review in a case of violation of a fundamental right guaranteed by the Federal Constitution; and the judge erred in law and in fact in rejecting the explanation given by appellant in making the application for extension of time and leave to apply for judicial review.

Held, dismissing the appeal:

(1) **(per Zawawi Salleh JCA, majority)** The judge had correctly applied the principles governing an application for extension of time to apply for leave for judicial review. In determining whether to extend time, Her Ladyship dealt first with the appellant's explanation for the delay. Her Ladyship held that the explanation given by the appellant was unacceptable and consequently dismissed the appellant's application for an extension of time. Her Ladyship did not consider the merits of the leave application for judicial review (see para 72).

(2) **(per Zawawi Salleh JCA, majority)** Delays in making applications for judicial review may be explained, but not every explanation provides an acceptable reason for granting an extension of time. Whilst O 53 r 3(6) of the RHC gives little or no guidance regarding factors to be taken into consideration in the exercise of discretion, there is now a considerable body of case law regarding the exercise of discretion to extend the 40-day time limit imposed by O 53 r 3(6). The courts have accepted that their power to extend time should be exercised on a principle basis: that they should articulate the criteria they are applying and should provide reasons for their ruling (see para 77).

(3) **(per Zawawi Salleh JCA, majority)** The prima facie rule is that an application to apply for leave for judicial review made outside the prescribed period will not be entertained and it is a pre-condition to the exercise of discretion in his or her favour that the applicant show an 'a good reasons' of the delay. The court would not grant the application for extension unless positively satisfied it is proper to do so. The judicial rulings indicate that what explanations for delay will be acceptable may vary according to the circumstances of each case (see para 78).

(4) **(per Zawawi Salleh JCA, majority)** Apart from naming the wrong party and the time taken to have proceedings disposed, no other reason has been given for the delay. No material whatsoever had been adduced to explain why the appellant in any event out of time in taking out the second JR application and for that matter, even the first JR application. There was no evidence that the appellant had a good reason for failing to file the application for leave for judicial review within time. There was

nothing advanced by the appellant to show that he had a good reason, or any reason at all, for that matter, for failing to file the application promptly apart from uncertainty as to who the proper party was to be named as the respondent and the length of time it took to dispose of this issue through the appellate process in respect of the second JR application (see paras 82–83).

(5) **(per Abdul Aziz Abdul Rahim JCA, dissenting)** The current state of law in relation to leave application under O 53 r 3(6) of the Rules of the High Court 1980 (now O 53 r 3 (7) of the Rules of Court 2012) is: leave application must be made promptly, and in any event within 40 days from the date when the grounds for the application first arose or the date the decision was communicated to the applicant. However, the court has a discretion to extend the 40 days period if there is good reason for doing so. In considering whether there is good reason to extend the 40 days period there must be explanation of the delay in making the application; and the court is not to consider the merits of the case at this stage (see para 24).

(6) **(per Abdul Aziz Abdul Rahim JCA, dissenting)** In the Menteri Besar's appeal, it was acknowledged that the application was made out of time and without any application for leave to extend the 40 days period. Even at the High Court stage, the issue as to the extension of time to file for leave for judicial review and the reasons for the delay in making the application were never canvassed and decided. Likewise when the appeal came up for hearing before this court, the court did not have the opportunity to consider whether the judge had correctly decided to grant the leave for judicial review when the application itself was made out of time. The High Court Judge had not given sufficient consideration to the fact that upon the withdrawal of the first JR application the appellant immediately filed a fresh second JR application (the Menteri Besar's appeal) (see paras 26 & 29).

(7) **(per Abdul Aziz Abdul Rahim JCA, dissenting)** The present application (the third JR) was filed by the appellant's as soon as the Federal Court had pronounced its decision. The appellant was entitled to wait for the outcome of the Federal Court decision on the Menteri Besar appeal because they were successful before the High Court but the latter decision was reversed by the Court on Appeal. The appellant should not be penalised for adopting that strategy. The appellant had behaved sensibly and reasonably. The explanation given by the appellant for the delay was, in the circumstances of this case, sufficient to amount to a good reason for the judge to exercise her discretion to grant the appellant the leave for extension of time and eventually to hear the application for leave for a judicial review on its merits (see para 34).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu telah memohon untuk, antara lain, lanjutan masa untuk memfailkan kebenaran semakan kehakiman; dan untuk kebenaran memohon perintah mandamus terhadap responden mengarahkan responden membuat bayaran bagi jumlah penghakiman yang menyebelahi perayu. Perayu telah memohon kebenaran untuk memohon semakan kehakiman ('permohonan SK pertama') yang telah difailkan di luar masa. Permohonan SK pertama kemudian telah ditarik balik. Perayu telah memfailkan permohonan lain untuk semakan kehakiman bagi perintah mandamus, bukan terhadap defendan-defendan dalam guaman asal tetapi terhadap Menteri Besar Pahang ('permohonan semakan kehakiman kedua') dan Mahkamah Tinggi telah membenarkan permohonan itu. Walau bagaimanapun semasa rayuan kepada Mahkamah Rayuan oleh Menteri Besar, rayuan itu telah dibenarkan atas alasan bahawa Menteri Besar adalah pihak yang salah ('rayuan Menteri Besar'). Pihak yang wajar sepatutnya responden. Dalam rayuan Menteri Besar, ia telah diputuskan bahawa permohonan perayu untuk semakan kehakiman telah difailkan di luar masa; dan tiada permohonan untuk kebenaran bagi lanjutan masa. Permohonan kebenaran perayu untuk merayu kepada Mahkamah Persekutuan terhadap keputusan dalam rayuan Menteri Besar telah ditolak. Perayu kemudian telah memohon untuk lanjutan masa untuk membuat permohonan semakan kehakiman dan untuk kebenaran memohon semakan kehakiman. Dalam permohonan semakan kehakiman ini ('SK ketiga') perayu telah menamakan pegawai kewangan negeri sebagai responden. Dalam permohonan itu perayu juga telah memasukkan permohonan kebenaran lanjutan masa untuk memohon semakan kehakiman. Responden telah merayu kepada mahkamah ini dan rayuan telah dibenarkan di mana mahkamah memutuskan bahawa permohonan kebenaran (dengan permohonan untuk lanjutan masa) patut disampaikan ke atas responden-responden. Kes itu kemudian telah diremitkan kepada Mahkamah Tinggi yang kemudian telah menolak permohonan untuk lanjutan masa dan menolak kebenaran perayu untuk memohon semakan kehakiman. Justeru, rayuan ini. Perayu telah berhujah bahawa hakim terkhilaf dari segi undang-undang dan fakta dalam mengguna pakai prinsip-prinsip am biasa yang mengawal budi bicara untuk memberikan lanjutan masa bagi memohon semakan kehakiman dalam kes pelanggaran hak penting yang dijamin oleh Perlembagaan Persekutuan; dan hakim terkhilaf dari segi undang-undang dan fakta kerana menolak penjelasan yang diberikan oleh perayu dalam membuat permohonan itu untuk lanjutan masa dan kebenaran untuk memohon semakan kehakiman.

Diputuskan, menolak rayuan:

(1) **(oleh Zawawi Salleh HMR, majoriti)** Hakim itu telah menggunapakai sewajarnya prinsip-prinsip yang mengawal permohonan untuk lanjutan masa bagi memohon kebenaran untuk semakan kehakiman. Dalam menentukan sama ada untuk melanjutkan masa, hakim yang bijaksana

terlebih dahulu memperkatakan tentang penjelasan perayu untuk kelewatan. Hakim tersebut memutuskan bahawa penjelasan yang diberikan oleh perayu tidak boleh diterima dan akhirnya menolak permohonan perayu untuk lanjutan masa. Hakim tersebut tidak mempertimbangkan merit untuk permohonan kebenaran bagi semakan kehakiman itu (lihat perenggan 72).

(2) **(oleh Zawawi Salleh HMR, majoriti)** Kelewatan dalam membuat permohonan bagi semakan kehakiman boleh dijelaskan, tetapi bukan setiap penjelasan memberikan sebab yang boleh diterima untuk memberikan lanjutan masa. Di mana A 53 k 3(6) KMT memberi sedikit atau tidak langsung memberikan panduan berkenaan faktor-faktor yang perlu dipertimbangkan dalam pelaksanaan budi bicara, kini terdapat kes undang-undang yang agak banyak berkenaan pelaksanaan budi bicara untuk melanjutkan had masa 40 hari yang dikenakan oleh A 53 k 3(6). Mahkamah menerima hakikat bahawa kuasa mereka untuk melanjutkan masa patut dilaksanakan berdasarkan prinsip asas: bahawa mereka patut menyatakan dengan jelas kriteria yang mereka pohon dan patut memberikan sebab-sebab keputusan mereka (lihat perenggan 77).

(3) **(oleh Zawawi Salleh HMR, majoriti)** Rukun prima facie ialah permohonan untuk memohon kebenaran bagi semakan kehakiman dibuat di luar tempoh yang ditetapkan tidak dilayan dan ia prasyarat untuk melaksanakan budi bicara yang menyebelahinya bahawa pemohon menunjukkan 'a good reasons' kerana kelewatan itu. Mahkamah tidak akan memberikan permohonan untuk lanjutan itu kecuali berpuas hati sepenuhnya ia adalah wajar untuk berbuat demikian. Keputusan kehakiman bahawa apa-apa penjelasan untuk kelewatan boleh diterima mungkin berbeza mengikut keadaan setiap kes (lihat perenggan 78).

(4) **(oleh Zawawi Salleh HMR, majoriti)** Selain daripada menamakan pihak yang salah dan masa yang diambil untuk menyelesaikan prosiding, tiada sebab lain diberikan untuk kelewatan itu. Tiada bahan dikemukakan untuk menjelaskan kenapa perayu dalam apa keadaan luar had masa dalam membuat permohonan SK kedua dan untuk perkara tersebut, permohonan SK pertama juga. Tiada keterangan bahawa perayu mempunyai sebab yang baik kerana gagal untuk memfailkan permohonan kebenaran bagi semakan kehakiman dalam tempoh masa. Tiada apa-apa yang dikemukakan oleh perayu untuk menunjukkan bahawa dia mempunyai sebab yang baik, atau apa-apa sebab langsung, untuk perkara tersebut, kerana gagal untuk memfailkan permohonan dengan segera selain daripada ketidakpastian siapa pihak sebenar yang perlu dinamakan sebagai responden dan tempoh masa diambil untuk menyelesaikan isu ini melalui proses rayuan berkenaan permohonan SK kedua (lihat perenggan 82–83).

(5) **(oleh Abdul Aziz Abdul Rahim HMR, menentang)** Keadaan undang-undang semasa berkaitan permohonan kebenaran di bawah A 53 k 3(6) Kaedah-Kaedah Mahkamah Tanah 1980 (kini A 53 k 3(7) Kaedah-Kaedah Mahkamah 2012) adalah: permohonan kebenaran perlu dibuat segera, dan dalam apa-apa keadaan dalam tempoh 40 hari dari tarikh apabila alasan-alasan permohonan pertama timbul atau tarikh keputusan diberitahu kepada pemohon. Walau bagaimanapun, mahkamah mempunyai budi bicara untuk melanjutkan tempoh 40 hari jika terdapat sebab yang baik untuk berbuat demikian. Dalam mempertimbangkan sama ada terdapat sebab yang baik untuk melanjutkan tempoh 40 hari itu pasti ada penjelasan untuk kelewatan dalam membuat permohonan; dan mahkamah tidak boleh mempertimbangkan merit kes itu di peringkat ini (lihat perenggan 24).

(6) **(oleh Abdul Aziz Abdul Rahim HMR, menentang)** Dalam rayuan Menteri Besar, ia diakui bahawa permohonan itu dibuat di luar masa dan tanpa apa-apa permohonan kebenaran untuk melanjutkan tempoh 40 hari itu. Malah di peringkat Mahkamah Tinggi, isu berhubung lanjutan masa untuk memfailkan kebenaran bagi semakan kehakiman dan sebab-sebab kelewatan dalam membuat permohonan itu tidak pernah diteliti dan diputuskan. Begitu juga apabila rayuan itu timbul untuk perbicaraan di hadapan mahkamah ini, mahkamah tidak mempunyai peluang untuk mempertimbangkan sama ada hakim telah memutuskan sewajarnya untuk memberikan kebenaran bagi semakan kehakiman apabila permohonan itu sendiri dibuat di luar masa. Hakim Mahkamah Tinggi tidak memberikan pertimbangan mencukupi berhubung fakta bahawa selepas penarikan balik permohonan perayu segera memfailkan permohonan SK kedua yang baharu (rayuan Menteri Besar) (lihat perenggan 26 & 29).

(7) **(oleh Abdul Aziz Abdul Rahim HMR, menentang)** Permohonan ini (SK ketiga) telah difailkan oleh perayu sejurus selepas Mahkamah Persekutuan menyampaikan keputusannya. Perayu berhak menunggu untuk hasil daripada keputusan Mahkamah Persekutuan ke atas rayuan Menteri Besar kerana mereka telah berjaya di hadapan Mahkamah Tinggi tetapi keputusan itu diakaskan oleh Mahkamah Rayuan. Perayu tidak patut dihukum kerana menggunakan strategi tersebut. Perayu telah berkelakuan bijak dan munasabah. Penjelasan yang diberikan oleh perayu untuk kelewatan itu adalah, dalam keadaan kes ini, mencukupi untuk membentuk sebab yang baik bagi hakim melaksanakan budi bicara beliau memberikan perayu kebenaran lanjutan masa dan akhirnya mendengar permohonan kebenaran semakan kehakiman atas meritnya (lihat perenggan 34).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5575–5579.

Cases referred to

Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Basanti Prasad vs Chairman, Bihar School Examination Board AIR 2009 SC, SC (refd)

Dehri Rohtas Light Railway Co Ltd v District Board, Shahabad AIR [1993] SC 802, SC (refd)

JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134; [1986] 1 CLJ 160 (Rep), SC (refd)

Kampung Bukit Kawan Raub (Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161, FC (refd)

Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd [2010] 4 MLJ 360; [2010] 5 CLJ 123, CA (refd)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54, FC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321, FC (refd)

Mohamed Nordin bin Johan v Attorney-General, Malaysia [1983] 1 MLJ 68; [1983] CLJ 271, FC (refd)

North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547, QBD (refd)

O'Reilly v Mackman [1983] 2 AC 237, HL (refd)

P V Narayana v AP State Road Transport Corporation [2013] (4) ALD 386, HC (refd)

QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)

R v Commissioner for Local Administration, ex parte Croydon London Borough Council and another [1989] 1 All ER 1033, QBD (refd)

Ramchandra Shankar Deodhar & Ors v The State of Maharashtra & Ors 1974 AIR 259, SC (refd)

Ravindran v Malaysian Examinations Council [1984] 1 MLJ 168, FC (refd)

Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow V Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108, FC (refd)

Sabah Berjaya Sdn Bhd v Director General Of Inland Revenue Department & Anor [1996] 5 MLJ 366, HC (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional & Ors [2006] 5 MLJ 60, CA (refd)

Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector Land Revenue, North-East District, Penang & Anor [1995] MLJU 410; [1995] 3 CLJ 434, HC (refd)

Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161, FC (refd)

Wong Peng Yan Benjamin v Genting Bhd & Anor [1993] 3 MLJ 713, HC (refd)

Legislation referred to

Federal Constitution arts 13, 13(1), 160
Government Proceedings Act 1956 s 33
Rules of the High Court 1980 O 53, O 53 r 3(6)
Rules of Court 2012 O 53 r 3(7)
Supreme Court Act 1981 s 31(6)

Appeal from: Originating Motion No 25–10 of 2010 (High Court, Kuantan)

Gopal Sri Ram (Lua Ai Siew, Elyazura bt Md Shaarani and David Yii Hee Keat with him) (Peter Lai Rajoo & Aiza) for the appellant.

Muhammad Shafee Abdullah (Ahmad Hanir Hambaly, S Sivanendran and Peter Skelchy with him) (Legal Advisor, Pahang Legal State Offices) for the respondent.

Abdul Aziz JCA (delivering dissenting judgment of the court):

[1] This is an appeal by the applicant in originating motion No 25–10 of 2010 against the decision of the learned high court judge at Kuantan dismissing the applicant's application for leave for judicial review (in encl 2) with cost of RM8,000.

[2] The application was dismissed on the ground of inordinate delay in making such application under O 53 r 3(6) of the Rules of the High Court 1980 ('the RHC 1980').

[3] Having heard counsel and after reading the appeal records my learned brother judges — Justice Mohd Zawawi Salleh and Justice Ahmadi Hj Asnawi — decided to dismiss the appeal. They were of the view that there are insufficient material before the trial judge for the latter to exercise the court's discretion to grant the application. I, however, have a different view. I decided to allow the appeal. The following are my reasons for allowing the appeal.

[4] First of all, it is pertinent to note that there are two kind of leave sought by the applicant/appellant. The first leave is leave for extension of time to file for leave for a judicial review and the second leave is leave to apply for a judicial review for an order of mandamus. The learned judge heard and decided to

dismiss the first leave. Thus, it follows that the application for the second leave also falls without it being heard on its merits. Secondly, the judgment obtained by the appellant against the defendant in Civil Suit No MT(2)–21–9 of 2009 at High Court Kuantan ('the original suit') is a valid judgment having gone through the rigmarole of the appeal process up to the Federal Court and the judgment still remains unsatisfied till today.

[5] For a better understanding of the factual matrix of the appeal I re-produced the chronology of events submitted by the counsel for the appellant. This chronology is not in dispute:

Civil suit	
9 December 2002	Appellant filed a suit against State Government of Pahang and Director of the Forestry Department vide Kuantan Civil Suit No MT(2)-21–9 of 2002.
25 May 2007	Judgment entered against the defendants in the civil suit after a full trial.
13 February 2008	Court of Appeal dismissed the defendant's appeal against the judgment.
17 September 2008	Federal Court dismissed defendant's motion for leave to appeal).
7 March 2008	High Court issued certificate under s 33 of the GPA.
7 April 2008	Section 33 certificate was served on state legal adviser.
Judicial Review (1) (Kuantan High Court OM No (MT1)25–5 of 2008)	
16 July 2008	The appellant applied for leave to apply for judicial review – State Secretary and the finance officer were named as the respondents. The appellant sought to amend and include the Menteri Besar as a party.
14 October 2008	The appellant withdrew the application.
Judicial Review (2) (Kuantan High Court OM No (MT1) 25–9 of 2008)	
15 October 2008	The appellant applied for leave — Menteri Besar of Pahang was named as the respondent.
20 April 2009	High Court granted leave to apply for judicial review.
31 March 2010	Court of Appeal allowed the appeal by Menteri Besar of Pahang.
5 October 2010	Federal Court by a majority dismissed appellant's motion for leave to appeal.
Judicial Review (3) (Kuantan High Court 25–10 of 2010)	

20 October 2010	The appellant filed application for extension of time to make an application for judicial review and leave to apply for judicial review. The respondent (state finance officer) is named as the respondent.
15 November 2010	The application (ex parte) was served on the AG's Chambers.
23 November 2010	High Court allowed an extension of time and granted leave to apply for judicial review.
1 December 2010	Application for judicial review was served on the respondent.
9 December 2010	Application for judicial review was served on the state legal adviser.
17 December 2010	The respondent appealed to Court of Appeal against the High Court order dated 23 November 2010.
26 November 2012	Court of Appeal accepted the respondent's argument, inter alia, that the leave application (with a prayer for extension of time) ought to have been served on the respondents and allowed the respondent's appeal. Case remitted to the High Court for inter partes hearing.
3 October 2013	High Court heard and dismissed the application for extension of time and refused the appellant leave to appeal for judicial review.

[6] In its application before the High Court, the appellant had prayed, inter alia, for extension of time to file for leave for judicial and secondly for leave to apply for an order of mandamus against the respondent directing the respondent to make payment of the judgment sum in favour of the appellant as certified in the certificate issued under s 33 of the Government Proceedings Act 1956 ('the GPA') dated 3 July 2008 in the original suit. The said certificate was served on the state legal advisor on 7 April 2008. But the respondent did not make any payment. As can be seen from the chronology of events above, on 16 July 2008 the appellant applied for leave to apply for judicial review ('the first JR application'). But for some reasons known to the appellant this application was withdrawn. The appellant's first JR application was also filed out of time.

[7] On 15 October 2008, the appellants filed another application for judicial review for an order of mandamus, not against the defendants in the original suit but against the Menteri Besar of Pahang vide OM No MT(1)–25–9 of 2008 (the second JR application). The appellant succeeded. The High Court allowed the application on 20 April 2009. However on appeal to this court by the Menteri Besar, the appeal was allowed on the ground that the Menteri Besar was the wrong party (see *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360; [2010] 5 CLJ 123 (CA) — the Menteri Besar's appeal). The court said the proper party should be the respondent.

[8] In the Menteri Besar's appeal, the majority of this court (comprising of Justice Jeffrey Tan JCA (as he then was) and Justice Sulaiman Daud JCA) held that the appellant's application for judicial review was filed out of time; and there was no application for leave for extension of time. However Justice Zaleha Zahari JCA (as Her Ladyship then was) took a different position and held that the application by the appellant was within time. Nevertheless, the court was unanimous that the Menteri Besar was the wrong party to be sued. The appellant's leave application to appeal to the Federal Court against this court decision in the Menteri Besar's appeal was dismissed.

[9] Thereafter on 20 October 2010, the appellant filed OM 25–10 of 2010 application for extension of time to make application for judicial review and for leave to apply for judicial review. In this judicial review application (the third JR) the appellant named the state financial officer as the respondent. In the application the appellant also included an application for leave for extension of time to apply for judicial review. The third JR was made ex parte.

[10] On 23 November 2010, the High Court allowed the extension of time and granted leave to apply for judicial review. Thereafter the application was served on the respondent. The respondent appealed to this court and the appeal was allowed with the court held that the leave application (with a prayer for extension of time) ought to have been served on the respondents. The case was then remitted to the High Court to be heard inter partes.

[11] On 3 October 2013 the High Court heard and dismissed the application for extension of time and refused the appellant's leave to apply for judicial review. Hence this appeal before us.

[12] The issue before the High Court was whether the appellant's application was out of time and if it was, is there acceptable explanation of the delay? The learned High Court judge held that it was and the explanation for the delay was not acceptable. The learned High Court judge's finding can be found in paras 15 and 16 of the judgment:

> [15] Saya merujuk kepada ekshibit 'LS2' afidavit Lee Sin diikrar pada 20 Oktober 2010 iaitu perintah bagi perakuan di bawah s 33 Akta Prosiding Kerajaan 1956 yang dikeluarkan kepada Kerajaan Negeri Pahang dan Pengarah Perhutanan Negeri Pahang Darul Makmur adalah bertarikh 7 Mac 2008. Perintah bertarikh 7 Mac 2008 tersebut telah diserahkan kepada Kerajaan Negeri Pahang dan Pengarah Perhutanan Negeri Pahang Darul Makmur pada 7 April 2008. Permohonan semakan kehakiman di sini difailkan pada 20 Oktober 2010. Terdapat kelewatan lebih kurang dua tahun enam bulan dan ia tidak mematuhi kehendak A 53 k 3(6) iaitu perlu difailkan dalam tempoh 40 hari dari tarikh keputusan diberitahu kepada responden.
>
> [16] Jika sekalipun tarikh pada 16 Jun 2008 diambil kira iaitu tarikh permohonan

untuk perintah mandamus telah memasukkan Setiausaha Kerajaan Negeri Pahang dan Pegawai Kewangan Negeri Pahang sebagai defendan-defendan, ia masih dibuat di luar tempoh masa. Permohonan untuk perintah mandamus tersebut ditarikbalik oleh pemohon pada 14 Oktober 2008. Pada 15 Oktober 2008 satu permohonan perintah mandamus berikutnya difailkan terhadap Menteri Besar Pahang untuk mematuhi perintah perakuan s 33 bertarikh 7 Mac 2008. Jika sekalipun nama responden dijadikan pihak di dalam permohonan Pemohon tersebut, masih lagi ia difailkan di luar tempoh masa iaitu lebih kurang tujuh bulan tujuh hari. Dalam semua keadaan permohonan pemohon sememangnya difailkan di luar tempoh masa 40 hari menurut A 53 k 3(6) KMT 1980 ataupun di bawah A 53 k 3(6) KMM 2012.

[13] The learned High Court judge said under O 53 r 3(6) of the RHC 1980, an application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds of application first arose or when the decision is first communicated to the applicant. The learned judge found, as can be seen from the above quoted para 15 of the High Court judgment, that the s 33 certificate under the GPA was issued on 7 March 2008 and served on the respondent on 7 April 2008. The application was filed on 20 October 2010 — there was a delay of approximately two years six months.

[14] The learned judge rejected the appellant's explanation for the delay that the Federal Court's decision on the mandamus application against the Menteri Besar was only given on 5 October 2010; therefore the 40 days period should begin from that date. The learned High Court judge said that the rule is clear that the 40 days is to be counted 'from the date when the grounds of the application first arose or when the decision is first communicated to the applicant'. The learned judge held that:

Dalam hal ini tarikh keputusan mengenai perakuan di bawah s 33 telah di maklumkan pertama kalinya kepada defendan-defendan di dalam kes 21 September 2002 adalah pada 7 April 2008 dan tarikh pertama kali permohonan mandamus dibuat pada 16 Julai 2008. Tarikh keputusan Mahkamah Persekutuan pada 15 Oktober 2010 bukanlah tarikh keputusan pertama kalinya di beritahu kepada respondent ataupun tarikh permohonan pertama kali dibuat.

[15] The learned judge also relied on a passage from the judgment of Jeffrey Tan JCA (as he then was) in the Menteri Besar's appeal to reject the appellant's argument. The passage reads:

[63] Given that there was no direction that payment was suspended, the duty to pay arose upon service of the s 33 certificate, literally upon presentation thereof. On the facts, the grounds for the application first arose on 7 April 2008 when service of the s 33 certificate was not met with payment. Filed more than six months later on 15 October 2008 without any extension of the said 40 days, the application for judicial review was way out of time. There was a patent failure to comply with the rules of court, and the order of mandamus should have been there and then refused.

[16] It is observed that though O 53 r 3(6) stipulates that an application for leave for judicial review shall be made promptly, the court still has the discretion to extend the 40 days period stipulated therein if the court considers there is good reason for doing so.

[17] Before us learned counsel for the respondent submitted that the learned judge on the facts alluded to above had exercised her discretion correctly and in accordance with the established principles and Her Ladyship's decision does not warrant appellate intervention. It was argued that since this court had, by majority in the Menteri Besar's appeal, held that the judicial review was out of time, the learned judge was bound by the finding of fact of the delay in making the application. Thus it was argued that issue estoppel/res judicata in respect of the appellant's ability to challenge the finding on the commencement date and the fact that the second mandamus application was out of time in the circumstances applies here: see *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713 *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547 and *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783.

[18] Learned counsel for the respondent, Tan Sri Shafee, submitted that the issue in this appeal is not so much about leave but it is about jurisdiction. He argued that there is no material before the court to explain the delay and on which the court could rightly exercise its discretion for extension of time. He submitted that this is substantive law and fundamental; and cannot be disregarded though the appellant's application for an order of mandamus in this case involves question of fundamental rights to property under art 13 of the Federal Constitution. This, he said, should be so because art 13 speaks of deprivation of property 'in accordance with law'; and 'law' under art 160 of the Federal Constitution includes procedural law. He also submitted that there was suppression of fact in the appellant's application. He argued that there was no reference at all to the first JR application which was withdrawn in the second JR application by the appellant. This application under appeal, he said, is the third JR application by the appellant.

[19] Learned counsel further submitted that it is settled law that a failure to commence the judicial review process within the 40 day time frame goes to jurisdiction of the court to hear the application. He cited and referred to the Federal Court's decision in *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161 where the Federal Court disapproved the proposition by Gopal Sri Ram JCA (as he then was), (and who incidentally is the lead counsel for the appellant in this appeal), in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional & Ors* [2006] 5 MLJ 60 as obiter and does not reflect the correct proposition of law as discussed by

the Federal Court in *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54 and *Ravindran v Malaysian Examinations Council* [1984] 1 MLJ 168.

[20] One of the issues before the Federal Court in *Wong Kin Hoong & Anor* is whether the law as to leave application under O 53 of the RHC 1980 as stated in *Mersing Omnibus* and *Ravindran* is still good law as these two cases were decided prior to the amendment of O 53 r 3(6) of the RHC 1980?

[21] *Tang Kwor Ham & Ors* was the majority decision of this court. The judgment was delivered by Gopal Sri Ram JCA (as he then was). The gist of Gopal Sri Ram JCA remarks in *Tang Kwor Ham & Ors* that did not find favour with the Federal Court is that in hearing leave application for extension of time to apply for extension of time the court should undertake a closer scrutiny of the merits of the case and that 'it is not an improper exercise of discretion for a judge who forms the preliminary view that an application for extension ought to be refused to hear full arguments on the merits of the case for the purpose of testing his preliminary conclusion against other issues that arise in the case, including the strength and weakness of the respondent's case'.

[22] In *Mersing Omnibus* the Federal Court held that the application for leave was filed after six weeks had lapsed from the decision of the Minister and the applicant had neither sought an extension of time nor accounted for the delay to the satisfaction of the judge; so leave for judicial review should not be granted. In *Ravindran* the trial court rejected the applicant's explanation for delay in applying for the extension of time and also dealt with the merits of the case if the explanation for the delay was accepted. The Federal Court held that as the learned trial judge had rejected the explanation for the delay, 'it follows that the learned judge had no jurisdiction to hear the application for leave for an order of certiorari'.

[23] In *Wong Kin Hoong & Anor* the Federal Court answered the question posed in the negative and held that the principles on leave application under O 53 in *Mersing Omnibus* and *Ravindran* are still good law though the two cases was decided before the amendment to the said O 53. Further it was observed the proposition as stated in *Tang Kwor Hoong* was made in 'complete absence of discussion or reference to the Federal Court decision in *Mersing Omnibus* and *Ravindran*'.

[24] Following the above discussion, the current state of law in relation to leave application under O 53 r 3(6) of the RHC 1980 (now O 53 r 3(7) of the Rules of Court 2012) is thus: leave application must be made promptly, and in any event within 40 days from the date when the grounds for the application first arose or the date the decision was communicated to the applicant. The

court however has a discretion to extend the 40 days period if there is good reason for doing so. In considering whether there is good reason to extend the 40 days period there must be explanation of the delay in making the application; and the court is not to consider the merits of the case at this stage.

[25] So, coming back to the present appeal, is there material before the trial Judge to consider giving leave to extend time (the 40 days period) for the appellant to apply for leave for judicial review? The respondent said there was none and the learned judge agreed with it. The appellant however said that there is and this can be seen from the chronology of events mentioned above.

[26] At this juncture it is worth to note that Jeffrey Tan JCA in the Menteri Besar's appeal had acknowledged that the application was made out of time and without any application for leave to extend the 40 days period. This means that even at the High Court stage the issue as to the extension of time to file for leave for judicial review and the reasons for the delay in making the application were never canvassed and decided. Likewise when the appeal came up for hearing before this court, the court did not have the opportunity to consider whether the learned judge had correctly decided to grant the leave for judicial review when the application itself was made out of time!

[27] In the present appeal the appellant had, together with the application for leave for judicial review, also applied for leave to extend time. However the learned judge rejected the explanation given by the appellant for the delay in making the application. The explanation given by the appellant was that the appellant had filed and obtained leave for judicial review for an order of mandamus against the Menteri Besar as the respondent. But the Menteri Besar had challenged the leave and the matter had gone up to the Federal Court. The decision by the Federal Court on the challenge by the Menteri Besar was given only on 5 October 2010. Following that decision the appellant filed the application which is the subject matter of the present appeal. The application was filed on 16 October 2010 — a matter of ten days after the Federal Court's decision.

[28] The learned judge held that the 40 days period should be counted from 7 April 2008 that is the date when the certificate under s 33 of the Government Proceedings Act 1956 was served on the state legal advisor or at worse from 16 July 2008 when the appellant filed the first application for judicial review (Kuantan High Court OM No (MT1) 25–5 of 2008) which was later withdrawn on 14 October 2008.

[29] However in my view the learned judge had not given sufficient consideration to the fact that upon the withdrawal of the first JR application the appellant immediately filed, on 15 October 2008, a fresh second JR

application (the Menteri Besar's appeal). This application had a chequered history. This application was allowed by the High Court. But it had gone through a rigmarole of appeal process until it reached the Federal Court. But unfortunate for the appellant the Federal Court agreed with this court that the Menteri Besar was the wrong party to be sued. In the circumstances is it not reasonable for the appellant to wait until the outcome of its application to appeal to Federal Court against the decision of this court in the Menteri Besar's appeal? I posed this question because at the material time the appellant had been granted leave by the High Court to proceed for an order of mandamus against the Menteri Besar until this court, on appeal by the latter, ruled against the appellant. In this regard I would adopt the minority view by Zaleha Zahari JCA (as she then was) in the Menteri Besar's appeal. The relevant paragraph of the judgment reads:

> On the facts of this case it is clear that the respondent only commenced enforcement proceedings by way of an application for judicial review after all appeals against the said judgment had been disposed of. The judicial review application for mandamus resorted to by the respondent was to overcome the problem when confronted with the recalcitrance of the defendants in the original suit to pay the said judgment. Clearly, in the present circumstances the fact that the respondent took such an action after all appeals had been disposed of should not be held against them. I am in agreement with the respondent's counsel that the filing of the application for judicial review for an order or mandamus within forty days of the Federal Court decision (17 September 2008) that the respondent had acted 'promptly' and in compliance with O 53 r 3(6) of the Rules.

[30] In *Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector Land Revenue, North-East District, Penang & Anor* [1995] MLJU 410; [1995] 3 CLJ 434, it was said that the court has unfettered discretion to grant an extension of time to apply for judicial review, so long as there are some material on which the court can exercise its discretion in favour of the appellant.

[31] Learned counsel for the appellant submitted that the relevant material in support of the appellant's application for extension of time to apply for mandamus, was before the High Court. He submitted the historical background averred by the respondent in its affidavit opposing the leave application which the respondent said constituting material facts to have been suppressed by the, are in truth facts that reinforced the appellant's case for extension of time. Learned counsel for the appellant reiterated that the delay was occasioned by reason of a view taken by counsel on which party should be impleaded. The earlier application against the state secretary and the respondent was withdrawn on 14 October 2008. The appellant on advice took the view that the Menteri Besar was the correct party, a view which the High Court agreed with in proceedings commenced against the Menteri Besar. On appeal to this court, two of the judges on the panel hearing the appeal (ie the Menteri Besar's appeal) took a different view while the third member of the

panel addressed only the time issue. The leave application before the Federal Court was dismissed with one judge entering a dissent. In other words, learned counsel for the appellant submitted, the question of law as to whether the Menteri Besar was the correct party was one upon which the judges disagreed; the appellant therefore was not guilty of any intentional delay.

[32] It was also submitted that the third JR application for leave and extension of time was served on the Attorney General in accordance with the provisions of O 53 of the RHC 1980 and the Attorney General thought it fit not to appear and object or oppose the application for an extension of time to apply for leave for judicial review. Does this not count for something? It was submitted that this shows that the application is bona fide and have merits. The stand taken by the Attorney General not to object to the application also, it was submitted, strengthened the appellant's case that there is no inordinate delay on its part in making the application.

[33] The threshold for granting of leave for extension of time under O 53 r 3(6) of the RHC 1980 is low. The appellant need only to show and satisfied the court that there is a good reason to do so. In *R v Commissioner for Local Administration, ex parte Croydon London Borough Council and another* [1989] 1 All ER 1033 cited and referred to by the appellant, Woolf LJ said:

> While in the public law field, it is essential that the courts should scrutinise with care any delay in making application and a litigant who does delay in making an application is always at risk, the provision of RSC O 53, r 4 and s 31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is in my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled.

[34] Learned counsel submitted that in this case the appellant had behaved sensibly in applying for mandamus against the Menteri Besar having acted on advice by their legal advisors and the application was allowed by the High Court. Unfortunately however, the appellate court had a different view resulting in the matter of whether the Menteri Besar was the correct party to be issued with an order of mandamus was put before the Federal Court. The whole process took about two years. The present application (ie the third JR) was filed by the appellant's as soon as the Federal Court had pronounced its decision. I agree with this submission. In my view the appellant is entitled to wait for the outcome of the Federal Court decision on the Menteri Besar appeal because they were successful before the High Court but the latter decision was reversed by this Court on Appeal. I do not think the appellant should be penalised for adopting that strategy. It is my view that in the circumstances the appellant has behaved sensibly and reasonably I think the explanation given by the appellant for the delay is, in the circumstances of this case, sufficient to

amount to a good reason for the learned judge to exercise her discretion to grant the appellant the leave for extension of time and eventually to hear the application for leave for a judicial review on its merits.

[35] Moreover in this case, the appellant has a valid judgment against the respondent and a certificate under s 33 of the Government Proceedings Act 1956 had been issued against, and served on, the respondent. It is now settled by the Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321 that once a certificate under s 33 of the Government Proceedings Act 1956 has been issued there is a duty on the part of the relevant state government to comply with the terms of the certificate.

[36] The State Government of Pahang, in this case represented by the respondent, in refusing or failing to pay the appellant the amount stated in the certificate (the amount which the appellant is legally and lawfully entitled to) when the certificate was served on the respondent has in fact denies the appellant's constitutional right to the property which is the judgment sum payable under the certificate. In such a case 'the court must, *ex debitio justitiae*, grant the appellant threshold standing' to proceed — see *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532.

[37] The court also must not refuse leave if the point taken in an application under O 53 r 3(6) is 'not frivolous to merit refusal of leave in limine and justified argument on a substantive motion' — see *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68; [1983] CLJ 271 and *JP Berthelsen v Director General Of Immigration, Malaysia & Ors* [1987] 1 MLJ 134; [1986] 1 CLJ 160 (Rep).

[38] Learned counsel for the appellant cited and referred to two Indian cases — *Ramchandra Shankar Deodhar & Ors v The State of Maharashtra & Ors* 1974 AIR 259, *P V Narayana v AP State Road Transport Corporation* [2013] (4) ALD 386, — where it was held that where fundamental rights are violated and the delay is not directly attributable to the party seeking the relief the court would be justified to grant the relief and cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like.

[39] In *P V Narayana v AP State Road Transport Corporation* [2013] (4) ALD 386, a delay of five to 18 years in making application is not a ground to refuse relief. Similarly in the case of *Basanti Prasad v Chairman, Bihar School Examination Board* AIR 2009 SC and *Dehri Rohtas Light Railway Co Ltd v District Board, Shahabad* AIR 1993 SC 802.

[40] Though in Indian law there is no equivalent of O 53 r 3(6), the

principles alluded to the case law referred to above regarding the exercise of discretion where it involves issues of fundamental rights are equally relevant in our case if the delay in making the application is adequately explained.

[41] In *Sabah Berjaya Sdn Bhd v Director General of Inland Revenue Department & Anor* [1996] 5 MLJ 366, the application for extension of time was made approximately seven years from the alleged default complaint of; yet the court granted the leave on being satisfied that the appellant has accounted for the delay. Likewise in this present appeal my view is that the appellant has adequately explained the delay. The facts contributing to the delay were also alluded to by the respondent in their affidavit in reply.

[42] In conclusion, I will say that an application for judicial review under O 53 of the RHC (now O 53 of the ROC 2012) in normal circumstance is two stage process. The first stage is application for leave to issue the judicial review. The second stage, if the applicant is successful at the first stage, is the hearing of the judicial review on its merits. In situation where the applicant is out of time (ie exceed the 40 days period) the application is a three stage process. The first stage is to apply for extension of time. As I have alluded to earlier in this judgment, the threshold for this stage is low. At this stage the applicant must explain the delay and if the court finds that the explanation is a good reason to excuse the delay then leave to extend time should be granted. In order to determine whether the explanation for the delay amounts to good reason, the court must consider the whole application in its entirety including whether the application is frivolous or not. This does not mean that the court at this stage must consider the merits of the application for judicial review. The court however has to be satisfied that application justified further arguments and the delay is not due to the applicant's indolence.

[43] For the above reasons, I will allow this appeal with cost to the appellant.

Zawawi Salleh JCA (delivering majority judgment of the court):

INTRODUCTION

[44] This appeal is directed against the decision of the High Court Kuantan (Mariana Yahya J, presiding) dated 3 October 2013 dismissing the appellant's application for an extension of time to apply for leave to commence judicial review proceedings.

[45] This appeal is concerned with whether time should be extended to apply for leave for judicial review. However, this, strictly speaking, is a side show. In the main show is the application for leave to apply for an order of

mandamus against the respondent, directing the respondent to make payment of the judgment sum in favour of the applicant as stipulated in the certificate issued pursuant to s 33 of the Government Proceedings Act 1956, dated 7 March 2008, in the original suit. On 7 April 2008, the certificate was served on the state legal advisor acting on behalf of the Government of Pahang and the Director of Forestry for the State of Pahang. There was no payment.

THE ANTECEDENT FACTS AND PROCEEDINGS

[46] This case has had a chequered history which needs to be explained in order to appreciate how the present position is arrived at.

[47] On 9 December 2002, the appellant filed a suit against the State of Government of Pahang and the Director of Forestry for State of Pahang in Kuantan Civil Suit No MT(2)–21–9 of 2002 for breach of contract.

[48] After a full trial, the High Court entered judgment in favour of the appellant in the sum of RM37,127,471.60 with interest at the rate of 8%pa from 31 December 2000 to date of settlement. The respondent appealed against the said judgment to the Court of Appeal.

[49] On 13 February 2008, the Court of Appeal dismissed the appellant's appeal on the ground that the record of appeal has not been filed within time. An application for leave to appeal to the Federal Court was dismissed on 17 September 2008.

[50] In the meantime, on 7 March 2008, the senior assistant registrar issued a certificate under s 33 of the Government Proceedings Act 1956 and was served on the state legal adviser. There was no payment made by the State Government of Pahang and Director of Forestry for the State of Pahang.

[51] On 16 July 2008, the appellant filed on application for a mandamus order which included the state secretary and the respondent as defendants ('the first mandamus application'). The appellant also sought to amend and include the Menteri Besar of the State of Pahang as a party. However, on 14 October 2008, the appellant withdrew the first mandamus application.

[52] On 15 October 2008, the appellant filed an application for judicial review for a mandamus order against the Menteri Besar of Pahang ('the second mandamus order').

[53] On 20 April 2009, the High Court granted the second mandamus application directing the Menteri Besar of Pahang to pay the monies stipulated in the certificate dated 7 March 2008 within 14 days.

[54] On 22 April 2009, a notice of appeal was filed by State of Pahang against the decision given on 20 April 2009.

[55] On 9 October 2009, the Court of Appeal allowed the Menteri Besar's appeal, inter alia, on the grounds that the wrong party was named as respondent and the second mandamus application was out of time as time began to run from 7 April 2008.

[56] By notice of appeal dated 5 November 2009, the appellant applied for leave to appeal to the Federal Court. The Federal Court on 5 October 2010 dismissed the appellant's application.

[57] On 20 October 2010, the appellant filed an application at the High Court for leave to apply for judicial review ('the third mandamus application'). The appellant also applied for an extension of time to make the application. The application was vigorously opposed by the respondent.

[58] On 23 November 2010, the High Court allowed an extension of time and granted leave to apply for judicial review.

[59] On 17 December 2010, the respondent appealed to the Court of Appeal against the High Court order dated 23 November 2010. On 26 November 2012, the Court of Appeal allowed the respondent's appeal, inter alia, on the ground that the leave application (with a prayer for extension of time) ought to have been served on the respondent. The Court of Appeal remitted the appellant's application to the High Court for inter parties hearing.

[60] On 3 October 2013, the High Court heard and dismissed the application for extension of time and the third mandamus application with costs of RM8,000. Hence, this appeal.

THE APPEAL

[61] In the memorandum of appeal, various grounds are raised assailing the impugned judgment but before us, learned senior counsel for the appellant focused his arguments on the following grounds:

(a) the learned judge erred in law and fact in applying the ordinary general principles governing discretion to grant an extension of time to apply for judicial in a case of violation of a fundamental right guaranteed by the Federal Constitution; and

(b) the learned judge erred in law and in fact in rejecting the explanation given by appellant in making the application for extension of time and leave to apply for judicial review.

DISCUSSION AND DECISION

[62] Learned senior counsel for the appellant submitted that this is a case in which the appellant obtained a money judgment against the State of Pahang and a certificate under s 33 of the Government Proceedings Act 1956, has been issued but the respondent failed and/or refused to make payment of the said judgment. Therefore, the appellant's fundamental rights guaranteed under art 13(1) of the Federal Constitution had been infringed.

[63] Learned senior counsel contended that the general law regarding delay and the doctrine of laches which relate to ordinary civil actions, such as actions for damages, should not be the controlling principles in deciding an application for extension of time to apply for judicial review where fundamental rights had been violated.

[64] In support of his submission, reliance was placed upon four Indian cases: *Ramchandra Shankar Deodhar & Ors v The State Of Maharashtra & Ors* 1974 AIR 259, *P V Narayana v AP State Road Transport Corporation* [2013] (4) ALD 386, *Basanti Prasad vs Chairman, Bihar School Examination Board* AIR 2009 SC, *Dehri Rohtas Light Railway Co Ltd v District Board, Shahabad* AIR [1993] SC 802.

[65] Reference was also made to the case of *Sabah Berjaya Sdn Bhd v Director General Of Inland Revenue Department & Anor* [1996] 5 MLJ 366 where the application for extension of time was made approximately seven years from the alleged default complained of. On the factual matrix of the case, the court was satisfied that the appellant has accounted for the delay in making the application for leave for an order of certiorari and allowed the application for extension of time.

[66] Learned senior counsel emphasised that the court has a wide discretion to grant an extension of time to apply for leave for judicial review. The court should have regard to the whole history of the matter, the conduct of the parties, the nature of litigation and the effect that granting an extension of time would have on other persons involved.

[67] Another argument that was put forward by senior counsel is that in considering extension of time to apply for judicial review the test to be applied is which order would, in the context of the particular case, be favourable to the interest of justice. In this instant appeal, it was contended that the appellant is entitled to the relief claimed as it has a judgment in its favour that the state has either failed or refused to pay.

[68] In reply, learned senior counsel for the respondent argued that the

prohibition against a person being deprived of his property under art 13 of the Federal Constitution is subject to the relevant governing provision of the law. Article 13(1) of the Federal Constitution provides:

(i) No person shall be deprived of property save in accordance with the law.

[69] Learned senior counsel finds support in the decision of *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29, where the Federal Court held that:

> Article 13(1) of the Constitutionprovides that 'no person shall be deprived of property save in accordance with the law'. On this constitutional issue, the learned judge said in his grounds of decision that he had in a previous judgment followed the decision of the Supreme Court of Burma in *Tinsa Maw Naing v Commissioner of Police Rangoon & Anor* [1950] Burma Law Reports 17 *on the construction of 'in accordance with law' and held that 'when the Constitution speaks of law, it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature.*
>
> ...
>
> The result is that whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking art 13(1) of the Constitution, however arbitrary the law might palpably be.
>
> (Emphasis added.)

[70] The authorities have established that the expression 'law' includes procedural law. In *Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors; Chuah Han Mow V Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108, the court held that:

> '... in accordance with law' in art 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression 'in accordance with law' were to be construed as to exclude procedure then it would make nonsense of art 5.
>
> (See also *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631).

[71] It trite that the High Court had no jurisdiction to entertain applications for judicial review if they fail to comply with the 40-day time limit. Thus, compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction. In *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161), the court had this to say:

Secondly, we are of the view that the remarks of Gopal Sri Ram JCA as produced earlier in this judgment were obiter. These obiter remarks reflect an incorrect proposition of law as there was a complete absence of discussion or reference to the Federal Court decisions in Mersing Omnibus and Ravindran. Finally, we are of the view that the principle in Mersing Omnibus and Ravindran is still good law. Whilst it is true that both Mersing Omnibus and Ravindran were decided under the old O 53 r 1A of the RHCbut the principle in relation to an application to extend time to file an application for judicial review remains the same.

In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

[72] In our view, the learned judge had correctly applied the principles governing an application for extension of time to apply for leave for judicial review. In determining whether to extend time, Her Ladyship dealt first with the appellant's explanation for the delay. Her Ladyship held that the explanation given by the appellant was unacceptable and consequently dismissed the appellant's application for an extension of time. Her Ladyship did not consider the merits of the leave application for judicial review.

GROUND (B)

[73] Learned senior counsel for the appellant submitted that the High Court has unfettered discretion to grant an extension of time to apply for judicial review, so long as there are some material on which the court can exercise its discretion in favour of the appellant (see *Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector Land Revenue, North-East District, Penang & Anor* [1995] MLJU 410; [1995] 3 CLJ 434).

[74] Continuing his submission, learned senior counsel contended that in this instant appeal the delay in making the application for leave for third mandamus was unintentional. He went into some detail regarding the factual background of the case. Learned senior counsel pointed out that the delay was occasioned by reason of a view taken by appellant's counsel on which party should be impleaded. The earlier application against the state secretary and the respondent was withdrawn on 14 October 2008. The appellant on advice took the view that the Menteri Besar was the correct party, a view which the High Court agreed with in the proceedings against the Menteri Besar. On appeal to the Court of Appeal, each of judges of the court give their reasons. While their view did not coincide on all issues discussed, they were unanimous on the point

A that the Menteri Besar was the wrong party and that the instant respondent is the correct party. The leave application before the Federal Court was dismissed with one judge entering a dissent.

B **[75]** Learned senior counsel maintained that the application for extension of time and for leave to apply the third mandamus was in accordance with O 53 of the RHC 1980 and served on the Attorney General who thought it fit not to appear and oppose the applications. It showed that there was no inordinate delay on the part of the appellant and there is merit in the application.

C **[76]** Now, O 53 r 3(6) of the RHC 1980 provides as follows:

> (6) An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court
D may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[77] At the outset, we must say that delays in making applications for judicial review may be explained, but it is clear that not every explanation provides an
E acceptable reason for granting an extension of time. Whilst O 53 r 3(6) give little or no guidance regarding factors to be taken into consideration in the exercise of discretion, there is now a considerable body of case law regarding the exercise of discretion to extend the 40-day time limit imposed by O 53 r 3(6). The courts have accepted that their power to extend time should be exercised
F on a principle basis: that they should articulate the criteria they are applying and should provide reasons for their ruling.

[78] In our view, the prima facie rule is that an application to apply for leave for judicial review made outside the prescribed period will not be entertained
G and it is a pre-condition to the exercise of discretion in his or her favour that the applicant show an 'a good reasons' of the delay. The court would not grant the application for extension unless positively satisfied it is proper to do so. The judicial rulings indicate that what explanations for delay will be acceptable may vary according to the circumstances of each case.
H

[79] The settled law is that the operative time for the ground to have arisen, and which set the timeline within which the application is to be made, is the date when the first decision communicated to the applicant.

I **[80]** In this instant appeal, the learned judge held that the commencement date to calculate the 40-day period was 7 April 2008. The learned judge had this to say at p 12 of the supplementary appeal record:

> Dalam hal ini tarikh keputusan mengenai Perakuan di bawah s 33 telah

dimaklumkan pertama kalinya kepada defendan-defendan di dalam kes 21-9-2009 adalah pada 7.4.2008 dan dan tarikh pertama kali permohonan mandamus dibuat pada 16.7.2008. Tarikh keputusan Mahkamah Persekutuan pada 15.10.2010 bukanlah tarikh keputusan pertama kalinya diberitahu kepada responden ataupun tarikh permohonan pertama kali dibuat.

[81] In our view, the learned judge correctly held that Her Ladyship was bound by the finding of fact expressed by Jeffrey Tan JCA (as he then was) when the second mandamus application came up onappeal before the Court of Appeal. The passage found in *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360; [2010] 5 CLJ 123 states as follows:

... given that there was no direction that payment was suspended, the duty to pay arose upon service of the s 33 certificate, literally upon presentation thereof. On the facts, the grounds for the application first arose on 7 April 2008, when service of the s 33 certificate was not met with payment. Filed more than six months later on 15 October 2008 without any extension of the said 40 days, the application for judicial review was way out of time. There was a patent failure to comply with rules of court, and the order of mandamus should have been there and then refused.

[82] The issue now is whether there is a good reason for the application for the extension of time to be allowed. We have scrutinised the explanation for the delay proffered by the appellant. Apart from naming the wrong party and the time taken to have proceedings disposed, no other reason has been given for the delay. There is no material whatsoever has been placed before this court to explain why the appellant in any event out of time in taking out the second mandamus application and for that matter, even the first mandamus application.

[83] We find no evidence on which we are satisfied that the appellant had a good reason for failing to file the application for leave for judicial review within time. There is nothing advanced by the appellant to show that he had a good reason, or any reason at all, for that matter, for failing to the file the application promptly apart from uncertainty as to who the proper party was to be named as the respondent and the length of time it took to dispose of this issue through the appellate process in respect of the second mandamus application.

[84] It is well established that public law remedies must be pursued with dispatch and so, time is of the essence. The case for imposition of time limit on applications for judicial review was put most forcefully by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 in the following terms at pp 280–281:

The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the

authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

[85] In the text, *Civil Procedure 2010,* Vol 1, popularly called 'The White Book' at para 54.5.1, it is stated:

> The Courts have always recognised that public law claims are unlike ordinary civil litigation and require strict adherence to the time limits contained in the rules governing judicial review (*R v Institute of Chartered Accountants in England and Wales Ex p Anderson* [1996] 8 Admin LR 557).

CONCLUSION

[86] After a consideration of all the factors to be weighed in order to determine whether an extension of time ought to be granted to the appellant, we are satisfied that the learned judge's exercise of her discretion was not flawed. There is no reason to interfere with her discretion not to grant an extension of time, and, therefore, by majority, we would dismiss the appeal with costs of RM10,000 and affirm the decision of the learned trial judge. Our learned brother, Justice Abdul Aziz Abd Rahim decided to allow the appeal. Deposit to be refunded.

Appeal dismissed with costs.

Reported by Afiq Mohamad